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CURRENT TOPICS

Very soon the question as to whether a mortgagee may sue a grantee of a mortgagor upon his assumption of the payment of the mortgage will have been settled in every State of the Union. Nebraska has in its late case of Cooper v. Foss. (19 N. W. Rep., 506) "gone over to the majority." For fear that the warm weather and the conventions may have caused some to forget who are in the majority, we beg to refer to those courts who do *not* tell the mortgagee that the agreement between mortgagor and grantee is "none of his concern." Massachusetts, Michigan, New Jersey and California, still adhere to the old doctrine that strangers to the consideration of a contract have no legal interest in its enforcement, even though made for their benefit, We beg the pardon of the courts of these States, but we think that it is almost time for them to discard this fossilized rule, and adopt one that seems reasonable to the majority of the bench and bar.

Let us take this opportunity to make a correction which under ordinary circumstances, would be wholly unnecessary. In the abstract of the case of State v. Hopkins, appearing in our last Missouri addendum, by the fault of some one, whether that of the printer or ourself, we credited the unfortunate opinion to Chief Justice Hough, whereas Judge Norton should have received the glory. This case illustrates a weakness of many of our courts of last resort. A court requires stability in its judicial utterances, as much as in its own make-up. A court loses the confidence of its constituency and of the bench and bar of the country, more by its lack of force, than by the unreasonableness of its decisions. The doctrine of *stare decisis* is the best that can be preached. Let something be settled, and especially when property rights are involved, let adherence to its declarations be resolved. In the case referred, to the court, after twice recognizing within a very few years the validity of judgments of justices of the peace in suits for back taxes, now comes forth with its sweeping decision that justices have no jurisdiction and the titles to thousands of acres of land are declared to be spurious. It is needless to say that a slight change of position on a legal question involving the rights of investors creates a serious flutter among them, and invariably results in a serious blow to the progress of the state. The indiscreetness of Judge Phillips in the late case of Long v. Long had its effects. This decision is much more sweeping in its effect. The decision in itself, is worth nothing outside the State being a local question only, but the lesson its effects will teach us, will be profitable everywhere. Judge Hough was absent from court at the time this decision was rendered. If he had been present, his conservatism might have secured a different result. When a court has rendered a decision, or a construction of a statute has been long accepted, let not a new position be taken, but "stand by the old ship," and let the legislature destroy it, or construct a new one.

We invite the attention of our readers to to the answer of Crosby Johnson, Esq., on page 18, to query numbered 52, which is well worthy of careful perusal as an article. It is a somewhat elaborate consideration of the various points presented in the query, which is the most interesting we have ever come across, easements in gross, or appurtenant, and rights of way by necessity, being the subject of treatment. We indulge the hope that we may have many replies to queries as useful and thorough as that of Mr. Johnson.

Judge Drummond has resigned his position at last. He has faithfully served his constitutency for thirty-four years, and deserves all manner of praise for his administration of justice. Congress has recently recognized its duty of appreciation of well-spent service for the country's interests, and Judge Dummond will happily reap the benefit of its provision. He deserves it. That he may have many years of health and prosperity is the heartfelt wish of all who have ever encountered the man or his works.

LIENS OF VENDORS OF CHATTELS FOR THE PURCHASE-MONEY.

I.

I. *Nature and extent of the lien*—A vendor of goods has a lien upon them for the price, so long as they remain in his possession and the purchaser neglects to pay the price according to the terms of sale.[1] "A lien for the price is incident to the contract of sale, when there is no stipulation therein to the contrary; because a man is not required to part with his goods until he is paid for them"[2] In a leading case before the King's Bench, Bayley, J. upon this point said;[3] where goods are sold and nothing is said as to the time of the delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price, but the buyer has no right to have possession of the goods till he pays the price.

Part payment of the purchaser's money for goods sold, for cash or on credit does not divest the seller of his lien so long as he retains possession.[4] But payments in full for a severed portion of the goods divests the vendor of his lien in respect of that portion of the goods which has been actually paid for. The sale may be apportionable, although in one sense the contract is an entire contract. Thus, if a certain quantity of steel rails be sold at an entire price to be delivered at intervals, each portion to be settled for separately, and the contract is carried out in substance, though not at the exact times, nor in the exact amounts which had been arranged, but payment is made for a portion of the goods substantially as agreed, the vendor can have no lien on that portion of the goods which has been fully paid for.[5]

The effect of the vendor's exercising his right of lien is not to rescind the contract of sale;[6] and therefore the vendor continues to hold possession by virtue of his lien until that is foreclosed, or the vendee waives the contract of sale.

But if a seller of merchandise in order to maintain his lien for its price, refuses to permit the purchaser to take possession of it, he may thereby prevent an acceptance of it by the purchaser within the statute of frauds; and if there be no memorandum in writing of the contract and no part payment to bind the bargain, the seller cannot maintain an action for the price of the goods. If in such case the goods are destroyed by fire the loss will fall upon the seller.[7]

II. *The vendor's possession essential to his retaining a lien.*—It is a well settled rule that the vendor's right of lien depends upon his possession. He can never maintain it without having the actual or constructive possession of the goods. He can never maintain it after the goods have come into the possession of the purchaser.[8] It is generally immaterial whether the delivery be actual or constructive. It is true that it has sometimes been doubted whether a constructive delivery is sufficient to take away the vendor's right of lien; and while it would perhaps be going too far to say that in every possible case a constructive delivery would have this operation, the general rule is that such a delivery, as

[1] Parks v. Hall, 2 Pick. (Mass.) 206; Clark v. Draper, 19 N. H. 419; Milliken v. Warren, 57 Me. 46; White v. Welsh, 38 Pa. St. 396; Wanamaker v. Yerkes, 70 Pa. St. 443; Barr v. Logan, 5 Harr. (Del.) 52; Carlisle v. Kinney, 66 Barb. (N. Y.) 363; Cornwall v. Haight, Ib. 273; Morse v. Sherman, 106 Mass. 430, per Colt, J.; Haskins v. Warren, 115 Mass. 514, per Wells, J.; Ware River R. Co. Hibbard, 114 Mass. 447; Southwestern Freight & Cotton Press Co. v. Stannard, 44 Mo. 71; Bradley v. Michael, 1 Ind. 551; Owens v. Weedman, 82 Ill. 409; Welsh v. Bell, 32 Pa. St. 12. In California and Dakota Territory it is provided by code that one who sells personal property, has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price. 1 Codes & Stats. Cal. 1876. sec. 8,049; R. Codes Dak., 1877, sec. 1804.

[2] Arnold v. Delano, 4 Cush. (Mass.) 33, 39, per Shaw, C. J.; South Western Freight, etc. Co. v. Stannard, 44 Mo. 71.

[3] Bloxam v. Sanders, 4 B. & C. 941. To like effect see Leonard v. Davis, 1 Black. 476.

[4] Hodgson v. Loy, 7 T. R. 436, 440; Craven v. Ryders, 6 Taunt. 433; Bunney v. Poyntz, 4 B. & Ad. 568; Feise v. Wraig, 3 East. 93; Welsh v. Bell, 32 Pa. St. 12; Buckley v. Furmin, 17 Wend. (N. Y.) 504; Williams v. Moore, 5 N. H. 235; Hamburger v. Rodman, 9 Daly (N. Y.), 93.

[5] Merchants' Banking Co. v. Phœnix Bessimer Steel Co., 5 Ch. D. 205.

[6] Martindale v. Smith, 1 Q. B. 389.

[7] Safford v. McDonough, 120 Mass., 290.

[8] Parks v. Hall, 2 Pick. (Mass.) 206; Pickett v. Bullock, 52 N. H., 354; Welsh v. Bell, 32 Pa. St. 12; Bowen v. Burke, 13 Pa. St. 146; Boyd v. Mosely, 2 Swan (Tenn.) 661; Obermeyer v. Cole, 25 Ark. 562; Gay v. Hardeman, 31 Tex. 245; McNail v. Zeigler, 6: 8 Ill., 224 Thompson v. Wedge, 50 Wis. 642.

well as an actual delivery, defeats the lien.[9] Thus if the goods be stored in the vendor's ware-house, his delivery of the key of the ware-house to the purchaser, with the view of giving him possession amounts to a constructive delivery of the goods and defeats the vendor's lien.[10]

There may be a constructive delivery of the goods sold which will pass the title but which will not destroy the vendor's lien.[11] If goods be sold and counted out and set apart for the purchaser, there is such a constructive delivery that the title will vest in the purchaser and the property will be at his risk, and yet the seller has the indisputable right to refuse to deliver without payment.[12] Thus, two persons agreed with the managers of a lottery to take a large number of tickets and to give approved security on the delivery of the tickets. Part of the tickets were delivered and paid for, and the remainder were selected and the package marked by the managers with the name of the purchasers. The drawing of the lottery thereupon began, and the second day one of the tickets in this package drew a large prize, and the managers upon a subsequent tender of the price of this package of tickets refused to deliver them. It was held that the property in the tickets, subject to a lien for the purchase money, had passed to the purchasers.[13]

Marking and setting aside the goods sold do not amount to a delivery sufficient to divest the vendor of his lien,[14] though they may be sufficient to pass the title to the vendee. "There is manifestly a marked distinction between those acts, which, as between vendor and vendee, upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold goods as security for the price."[15] Marking, measuring, weighing and setting aside goods which are the subject of sale, serve only to identify the goods; for if they are capable of being identified without these acts, the title passes by the contract of sale. Thus, if the whole of a quantity of iron lying in a pile be sold and pointed out to the purchaser, there is no need of any further act of delivery to pass the property, but so long as the iron remains upon the premises of the vendor and thus in his possession he has the right to detain it until the price is paid.[16]

There may even be a qualified delivery of goods to the buyer, which will not destroy the seller's lien for the price. Thus, if it be shown that by the intention of the parties the delivery was for the purpose of allowing the buyer an opportunity for examining the goods and not for the purpose of giving absolute possession to the buyer, the lien is not lost; and a usage of trade in conformity with such intention may be shown.[17] But if it appear that the goods were delivered for the purpose

[9] Parks v. Hall, *supra* per Wilde J.

[10] Ellis v. Hunt, 3 T. R. 464, 468, per Lord Kenyon.

[11] Lickburrow v. Mason, 5 T. R. 367; S. C. 1 Smith's Lead., Cas. 8th Eng. Ed., 789; Owens v. Weldman, 82 Ill. 409; Sigerson v. Kahmann, 39 Mo. 206; South-Western Freight & Cotton Press Co. v. Stanard, 44 Mo. 71.

[12] South Western Freight & Cotton Express Co. v. Plant, 45 Mo. 517; Owens v. Weedman, 82 Ill. 409.

[13] Thompson v. Gray, 1 Wheat. 75. Chief Justice Marshall said the purchasers were absolutely bound to take the designated tickets. "A refusal to do so would have been a breach of contract, for which they would have been responsible in damages. When the parties proceed one step further, when the vendee in execution of this contract, selects the number of tickets he has agreed to purchase, and the vendor assents to that selection; when they are separated from the mass of tickets, and those not actually delivered are set apart and marked as the property of the vendee; what, then, is the state of the contract? It certainly stands as if the election had been previously made and inserted in the contract itself. An article purchased in general terms from many of the same description, if afterwards selected and set apart with the assent of the parties as the thing purchased, is as completely identified and as completely sold, as if it had been selected previous to the sale, and specified in the contract. * * * * The stipulation respecting security could not in such a case be considered as a condition precedent, on the performance of which the sale depended. Certainly the managers could have required and have insisted on this security, but they might waive it without dissolving the contract." And see United States v. Lutz, 2 Blatch. 383.

[14] Dixon v. Yates, 5 B. & Ad. 313; Goodall v. Skelton, 2 H. Bl. 316; Proctor v. Jones, 2 C. & P., 532 per Best, C. J.

[15] Arnold v. Delano, 4 Cush. (Mass.) 33, 39.

[16] Thompson v. Baltimore & Ohio R. R. Co., 28 Md. 396, 407, per Miller, J. "So long as the vendor does not surrender actual possession, his lien remains, although he may have performed acts which amount to a constructive delivery, so as to pass the title or avoid the statute. In all cases of symbolical delivery, which is the only species of constructive delivery sufficient to give a final possession to the vendee, it is only because of the manifest intention of the vendor utterly to abandon all claim and right of possession, taken in connection with the difficulty or impossibility of making an actual and manual transfer, that such a delivery is considered as sufficient to annul the lien of the vendor."

[17] Haskins v. Warren, 115 Mass. 514.

of completing the sale, evidence of a usage that the sale is not completed is inadmissible, and a usage that no title passes upon an ordinary sale and delivery without payment is unreasonable and invalid.[18]

A delivery of goods to the buyer to hold as bailee of the vendor does not divest the latter of his lien. But if the buyer after the completion of the contract of sale delivers the property to the seller to hold as his bailee, the latter cannot by virtue of such possession have a lien for the price;[19] unless the express terms of sale be for ready money, or such as to imply that the property is not to be taken away until it is paid for.[20]

A seller has the right to insist upon his lien for the price until he has made actual and absolute delivery to the buyer. In all cases of inchoate delivery, until the delivery is complete he may suspend it and insist upon his lien. Thus, if the seller has given to the buyer an order on a warehouseman for the goods, and before the buyer has presented the order to the warehouseman and taken the goods or had them transferred by the warehouseman to the name of the buyer or of some other person, the buyer becomes insolvent, the seller may reclaim the goods under his lien; and he may do this although the buyer has indorsed and delivered the order for value to another who did not know that the buyer had not paid for the goods.[21]

A vendor of personal property has no lien upon it after a fair and absolute delivery of it to the purchaser.[22] The rule in relation to real estate that a vendor has a lien for the purchase money, although he has conveyed the land to the purchaser absolutely and has delivered possession to him, has no application to personal property. Even as regards the rule as to real property it is one that does not exist at common law; but it is a doctrine of equity, and was transplanted into equity from the civil law.[23]

No lien or charge upon goods valid as against purchasers and debtors can be created in favor of a vendor not in possession, except by mortgage.[24] When the vendor delivers the goods the right of property becomes absolute in the buyer and the seller can have no claim upon them except by force of an instrument which can operate as a mortgage, and be made effectual by recording it as such.[25]

Upon a sale of goods already in the possession of the purchaser as agent of the seller no delivery is necessary beyond the completion of the contract of sale, to destroy the vendor's lien.[26]

If goods stored in a warehouse in the name of the owner's broker be sold by the owner to such broker, the vendor's lien for the purchase money is lost without any further delivery of the goods.[27] But if in such case the owner does not sell the goods to such broker in whose name the goods are stored, but to a third person who gives notice of his purchase to the broker, but not to the warehouseman the possession is not changed, and the lien of the vendor will revive on the insolvency of the purchaser.[28]

The vendor may by special contract retain a lien upon goods sold which as against the buyer will not be dependant upon the vendor's continued possession. When the common law itself raises a lien its continuance depends upon the vendor's possession. But the lien may be created and continued by contract irrespective of possession. The contract may stipulate the mode in which the lien may be retained; and if it provides that the vendor shall retain a lien upon the property in the hands of the vendee until the purchase money shall be paid, there is no rule of law to defeat the stipulation.[29]

III. *What change of possession destroys the lien.*—There is often difficulty in determining what constitutes such a change of possession from the vendor to the vendee, as will put an end to the vendor's lien. If the goods are delivered to the vendee's own servant, agent or carrier they are in legal effect delivered to

[18] Haskins v. Warren, *supra*.
[19] Marvin v. Wallis, 6 E. & B. 726.
[20] Tempest v. Fitzgerald, 3 B. & Ald. 680.
[21] Keeler v. Goodwin, 111 Mass. 490.
[22] Lapin v. Marie, 6 Wend. (N. Y.) 77; Baker v. Dewey, 15 Grant Ch. (U. C.) 668.
[23] By the Roman law the vendor of personal property could resort to the property in the hands of the purchaser for the payment of the price. The sale, though positive in terms, was regarded as made upon the condition that the price be paid.
[24] Obermyer v. Cole, 25 Ark. 562.
[25] Gage v. Hardeman, 31 Tex. 245.
[26] Edan v. Dudfield, 1 Q. B. 302; Batchelder *in re* 2 Lowell, 245; Warden v. Marshall, 99 Mass. 305; Martin v. Adams, 104 Mass. 262; Linton v. Butz, 7 Pa. St. 89.
[27] Batchelder *in re*, 2 Lowell, 245.
[28] Batchelder *in re supra*.
[29] Sawyer v. Fisher, 32 Me. 28; see Vassar v. Buxton, (N. C. 1882) 14 Rep. 121.

the vendee himself.[30] But a common carrier is not the servant of the vendee and therefore although the goods have left the actual possession of the vendor, he retains his lien while they are in the hands of the carrier until they have reached their destination, or the actual custody of the vendee, and may be stopped by him in *transitu*.[31]

Even after the goods have reached their destination, the seller has a right to stop them so long as they have not passed into the actual custody of the buyer and he has exercised no act of ownership over them.

This extension of the vendor's lien to goods in the possession of a common carrier, is by virtue of another right called the vendor's right of stoppage in *transitu*. But so far as concerns the vendor's right of lien without the aid of this extension, this right is at an end and the delivery is complete when the vendor has placed the goods in possession of a carrier to be transported to the buyer. The seller's only right in respect to the goods after such delivery in his right of stoppage *in transitu*, which is an equitable right in the nature of a lien, but well distinguished from it, to repossess himself of the goods while in the carrier's hands and before they have come into the actual possession of the buyer upon the buyer's insolvency.[32]

A vendor is deemed to have parted with the possession of chattels sold where the vendee has changed the character of the property by expending labor or money upon it, in pursuance of the contract of sale. Thus if the owner of land sells wood standing upon it, giving authority to the vendee to cut it within a certain time, the vendor has no lien on the wood for the price, in case of the vendee's insolvency after the wood is cut, and before it is removed. The vendee having expended labor and money in felling the trees and preparing the wood for the market, he must be regarded as having taken it into his actual, possession. His acts have wrought such a change of possession as to defeat any right of lien in the vendor.[33]

[30] Arnold v. Delano, 4 Cush. (Mass.) 33, 39, per Shaw, C. J.; Muskegon Booming Co. v. Underhill, 43 Mich. 629.

[31] Arnold v. Delano, *supra*.

[32] Bullock v. Stcherge, (U. S. C. C. D. Iowa, 1882) 14 Rep. 39; Boyd v. Mosely, 2 Swan (Tenn.) 661.

[33] Douglas v. Shumway, 13 Gray (Mass.) 498.

A delivery order upon a warehouseman does not without some positive act done under it operate as a constructive delivery nor deprive the seller of his right of lien for the price, even as against a third person who has in good faith purchased the goods of the buyer holding such order.[34] The indorsee of a bill of lading may have a better title to the goods which it represents, than the endorser had; but the indorsee of a delivery order has no better title through the indorsement than the indorser had. Even the fact that the sub-vendee was induced by the original vendee to purchase and pay for the goods by receiving the delivery orders given by the original vendor does not estop the latter from setting up his right as an unpaid vendor to withhold the goods.[35] In a case before the Common Pleas Division where a sub-vendor claimed that the vendor was estopped from setting up his right, all the judges said the order obviously contained no representation of any fact, and the sub-vendor had no right to rely upon it as a representation, and consequently he did not bring himself within the conditions of an estoppel.

[34] McEwan v. Smith, 2 H. L. Cas. 309; Townley v. Crump, 5 Nev. & M. 606; S. C. 4 Ad. & El. 58; Imperial Bank v. London Books Co., 5 Ch. D. 145, 200; Griffiths v. Perry, 1 E. & E. 680; Winks v. Hassall, 9 B. & C. 372. Lord Chancellor Cottenham delivering judgment in McEwan v. Smith, *supra*, used the following language: "It is said that though the delivery note does not pass the property as a bill of lading would have passed it, by being indorsed over from one party to another, still it operates as an estoppel upon the party giving it, so far, at all events, as a third party is concerned; and it is argued that it is a kind of fraud for a person to give a delivery note which the person receiving it may use so as to impose upon a third person, and then to deprive that third person of its benefit. But that argument is merely putting the argument as to the effect of a delivery note in another form, and it assumes that such a document has all the effect of a bill of lading. But as the nature and effects of these two documents are quite different from each other, it seems to me that such an argument has no foundation at all, and cannot be adopted without converting a delivery note into a bill of lading."

[35] Farmeloe v. Bain, 1 C. P. D. 445. The delivery order in this case was as follows: "We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date." Lindley, J., said: "The document amounts to no more than this.—You have a contract with me for the sale of certain zinc; and I am willing to deliver twenty-five tons off that contract, on the terms of that contract. That clearly does not amount to a representation that the vendee was at liberty to transfer to his vendee a property in the zinc which he himself did not possess."

A delivery order differs materially in its effect from a bill of lading;[36] for while a delivery order does not divest the vendor of possession until the order is accepted or actual possession is taken under it, the transfer of a bill of lading immediately divests the vendor of possession and consequently, of his right of lien. But in England by the recent Factor's Act, the transfer of a delivery order by a vendor to his vendee seems to have the same effect as the transfer of a bill of lading in defeating any vendor's lien or right of stoppage *in transitu*.[37]

A bill of lading is an instrument of title representing the property, and the delivery of it by the vendor to the vendee passes the title and the right of possession. It of course implies that the actual possessesion of the goods represented has passed from the vendor to the carrier who has issued the bill of lading. Moreover the delivery of the instrument of title is a complete legal delivery of the goods themselves. The vendor is consequently divested of his lien by the delivery of the bill of lading; but the vendor may until the goods have come to the actual possession of the vendee, or he has transferred the bill of lading to a third person for value, intercept the goods, in case the buyer becomes insolvent before paying the price.

A warehouse receipt or dock-warrant also differs materially from a delivery order. It is so far a document of title that the indorsement or transfer of it for value amounts to a delivery of the goods represented, and divests the vendor of his lien.[38] In the case of Spear v. Travers[39] decided 1815, the gentlemen of the special jury observed that in practice indorsed dock warrants and certificates are handed from seller to buyer, as a complete transfer of the goods.

A warehouseman who has issued his own receipt to a purchaser is himself estopped from denying his liability for the goods to the holder of the receipt; and he is estopped although the goods have not been separated from others of the same kind.[40]

There is an actual charge of possession under a delivery order when the warehouseman has entered the goods in the name of the purchaser, though the goods themselves are not moved from their place. When a delivery order has been lodged with the warehousekeeper, in whose warehouse the goods lie, whether this be the vendor's warehouse or belongs to another, and the warehouseman has transferred the goods in his books into the name of the purchaser, the vendor's lien is gone. From that moment the warehouseman becomes the bailee of the purchaser, and the delivery is as complete as if the goods had been delivered into his own hands.[41] And so if the warehouseman on receiving an order from the vendor to hold the goods on account of the purchaser, gives a written acknowledgment that he so holds them, he cannot set up as a defence for not delivering them to the purchaser, that by the usage of that particular trade the property in them is not transferred till it is re-measured, and that before they were re-measured the purchaser became insolvent. By the acknowledgment the warehouseman attorned to the purchaser.[42]

Even the verbal assent of the warehouseman to the order, upon the purchaser's communicating it to him will effect a change of possession without an actual transfer of the goods in his books to the name of the purchaser.[43]

But a mere notice of a sale given to a warehouseman or other bailee in possession of the goods does not generally deprive the vendor of his lien; but the bailee must enter into some obligation with the vendee, or recognize him in some way, so that he shall become his bailee instead of the vendor's bailee.[44] "Notice may be enough to put him on his guard and to render him liable to an action if he does anything inconsistent with the notice; and a notice silently received may be

[36] Keeler v. Goodwin, 111 Mass. 490.

[37] Factor's Act, 1877, 40 & 41 Vict., c. 39, § 14; Benjamin on Sales, 4th ed. § 1207.

[38] Whether an indorsement of the warrants of the West India Docks Co., would pass the property in the goods therein mentioned was left an undecided question in Lucas v. Lorrien, 7 Taunt. 278; though Dallas, J., said that he felt no doubt on the question.

[39] 4 Camp. 251.

[40] Adams v. Gorham, 6 Cal. 68; Goodwin v. Scannell, 6 Cal. 541.

[41] Harman v. Anderson, 2 Camp. 242; Arnold v. Delano, 4 Cush. (Mass.) 33, 39, *per* Shaw, C. J.; Parker v. Byrnes, 1 Lowell, 539.

[42] Stonard v. Dunkin, 2 Camp. 344; Hawes v. Watson, 2 B. & C. 540; Gosling v. Birnie, 7 Bing.339; Hall v. Griffin, 10 Bing. 246.

[43] Lucas v. Dorrien, 7 Taunt. 278.

[44] Batchelder *in re*, 2 Lowell, 245, 247.

evidence of acquiescence, and it may even be conclusive evidence thereof, by way of estoppel if third persons have been misled; but, as between the vendor and vendee, I understand that the possession is not changed until the warehouseman has in some way acknowledged the change, and has become the agent of the vendee. In the analagous law of stoppage *in transitu*, the carrier who receives goods very often has notice that the consignee has bought them, and is, in fact, their owner and he is notified and directed to deliver to the vendee; but until he has either delivered them or changed his relation in some way so as to become the exclusive agent of the vendee they may be stopped, if the occasion arises. In short, such an order is revocable in the case of the failure of the vendee, unless it has been acted on."[45]

A charge of warehouse rent by the vendor upon the goods left in his possession and stored in his own warehouse does not effect his right of lien for the unpaid purchaser's money; though a payment of such rent by a sub-vendee for the whole of the goods, and acceptance of the same by the vendor would rightly be regarded as a delivery of the whole.[47] But if the warehouse rent is not actually paid but only charged, such charge amounts to a notification by the seller to the purchaser that he is not to have the goods, until he has paid not only the price of the goods but also the rent.[48] And so if a sub-vendor pays the warehouse rent upon part of the goods upon receiving such part upon an order from the original vendee, the vendor's lien upon the remainder of the goods is not affected. His control and lien remain entire over the whole, until the delivery of the part. His lien is, however, divisible, and when part taken away, the lien remains on the goods which were not delivered, and for which the warehouse rent has never been paid.[49]

A vendor loses his lien by giving an acknowledgment that he holds the goods as bailee for the purchaser. In a case where a negotiable note was taken for the price of goods sold, the seller at the same time gave the buyer a certificate that he held them for the seller upon storage. Afterwards the buyer verbally offered to cancel the sale if the seller would surrender the note. He agreed to this, but the note having been discounted at a bank he did not tender the note till several days afterwards. In the meantime the buyer assigned the goods to certain of his creditors, informing them, however, of the conversation in regard to cancelling the sale. These assignees brought an action of trover against the seller for the goods whereupon it was held that the property vested in the buyer, and that the seller had no lien for the price of the goods. The contract to cancel the sale, was conditional; and as a re-sale of the goods it was void by the statute of frauds, the value of the goods being more than fifty dollars.[50]

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45 Batcheider *in re supra*, *per* Lowell, J.

46 Miles v. Gorton, 2 Cr. & M. 504; Bloxam v. Sanders, 4 B. & C. 941; Grice v. Richardson, 3 App. Cas. 319; Winks v. Hassall, 9 B. & C. 372; Hammond v. Anderson, 1 B. & P. N. R. 69.

47 Hurry v. Mangles, 1 Camp. 452.

48 Miles v. Gorton, 2 C. & M. 504, 513, *per* Bayley, B.

49 Miles v. Gorton, *supra*, *per* Bayley, B.

50 Chapman v. Searle, 3 Pick. (Mass.) 38.

RESCISSION OF CONTRACTS—RETURN OF CONSIDERATION.

II.

Return Required on Breach of Warranty.—In England and New York it has been decided that the buyer of goods can not, in the absence of fraud or an express agreement, return an article purchased and rescind the contract of purchase because the article is not as warranted by the seller.[1] But the contrary rule prevails in many of the States.[2] In Missouri if the article is worthless for the purpose for which it was bought the vendee is not bound to return it, but may retain it and yet avoid payment of the purchase price. Thus in a suit on a note given for a jack which the defendant alleged was worthless,

1 Dawson v. Collis, 10 C. B. 523; Vorhees v. Earl, 2 Hill, 288; Day v. Pool, 52 N. Y. 416. But see Mason v. Decker, 72 N. Y. 495; McGiffin v. Baird, 62 N. Y. 329; Heydecker v. Lombard, 7 Daly, 19; Neaffie v. Hart, 4 Lans, 4.

2 Bryant v. Ishburg, 79 Mass. 607; Rogers v. Hanson, 35 Iowa, 283; Jagers v. Griffin, 43 Miss. 134; Ralph v. R. Co., 32 Wis. 177; Butler v. Northumberland, 50 N. H. 33; Hyatt v. Boyle, 5 Gill & J. 121; Iron Co. v. Smith, 66 Pa. St. 340; Dill v. Sewell, 45 Ind. 268; Marston v. Knight, 29 Me. 341; Lord v. French, 61 Me. 420.

but which he did not offer to surrender, the court said: "If the article which forms the consideration of the note be worthless for the purpose for which it was purchased the consideration has wholly failed, although it may be of some value for another purpose."[3] And when pipe, sold with a warranty, "was defectively made, unfit for the purposes for which it was ordered, and worthless for any purpose but old iron," but where defendant had already made a part payment and notified the plaintiff "that the pipe was subject to his order," it was held he could avoid payment without returning or offering to return the pipe[4] In a suit to recover the price of a device to water stock the court said: "If the water drawer was worthless for the purpose for which it was purchased, this was a valid defence as showing an entire failure of consideration; and this whether the defendant offered to return the machine or not, or failed to notify the plaintiff of its worthlessness."[5] But these cases are wrong in principle and opposed to the weight of authority. So long as loss, detriment or inconvenience on the part of the promisee is recognized as a sufficient consideration to sustain a contract, it ought to be required of the vendee, before he is heard to say that there is an entire failure of consideration, either to return the thing purchased, or show that it is so utterly worthless that the retention of it is no loss, detriment, or inconvenience to the seller. To suffer him to retain it without paying the market price for it, because he had bought it for another purpose is to offer a reward for dishonesty, and to deprive an innocent man of his property without compensation.[6] If worth anything as "old iron," or for any purpose, he is not entitled to the benefit of it until he has bought and paid for it; and because it was not fit for the purpose for which it was sold and warranted is not payment. "It is not sufficient that the stocks were of no intrinsic value or of no market value. If they were capable of serving any purpose of advantage by their possession or control, or if their loss was a disadvantage to the tenant, he was entitled to have them returned."[7] And when the defendant bought eight bags of wool, and rejected the wool in one bag for the reason that it did not correspond with the warranty, and he offered to return the rejected wool, but without the bag in which it had been packed, the court held he had not rescinded, because as the eight sacks had been bought under one contract he could not rescind as to a single bag and because, although the value of the bag may have been very little, but as "it was something," that something must be returned before there could be a rescission.[8] The offer to return the article on account of breach of warranty should be unconditional, and should assign the breach as the ground therefor.[9] Driving oxen into vendor's neighborhood and turning them loose without informing the vendor, is not a sufficient return to sustain a rescission.[10] Where several articles are bought under an entire contract, the purchaser can not rescind as to some and affirm as to others.[11] If the seller notify the buyer that he will not take the article back, the buyer will be excused from making an effort to return it.[12]

If the purchaser of real estate is in possession with covenants of title, he can not avoid payment of the purchase money on account of a failure of his grantor's title without placing his grantor *in statu quo* by reconveying the land or by surrendering the possession of the land and releasing the covenants.[13] And if the vendor asks to have the contract for sale of land rescinded, he must offer to restore the consideration money which

[3] Barr v. Baker, 9 Mo. 850. See, also, Pacific G. Co. v. Mullen, 66 Ala. 582.

[4] Murphy v. Gay, 37 Mo. 535.

[5] Compton v. Parsons, 76 Mo. 455. To same purport; Branson v. Turner, 77 Mo. 489.

[6] Warden v. Fisher, 48 Wis. 338; Poulton v. Lattimore, 9 B. & C. 259; Drew v. Roe, 41 Conn. 41; Wilson v. Wagar, 26 Mich. 452.

[7] Bassett v. Brown, 105 Mass. 558.

[8] Morse v. Brackett, 98 Mass. 205; Warder v. Fisher, 48 Wis. 338. See also Morrill v. Nightingale, 39 Wis. 247; Paige v. McClellan, 41 Wis. 337; Pennock v. Stygles, 54 Vt. 226; Water Heater Co., 48 Vt. 378; Craver v. Hornburg, 26 Kans. 94: Allen v. Hart, 72 Ill. 104; Prickett v. McFadden, 8 Ill. App. 197; Johnson v. Smith, 86 N. C. 498; Sapona Iron Co. v. Holt, 64 N. C. 335; Krumbhaar v. Birch, 83 Pa. St. 416; Kimball Manf'g Co. v. Vroman, 35 Mich. 310; 24 Am. R. 558; Webb v. Odell, 49 N. Y. 583.

[9] Churchill v. Price, 44 Wis. 540; Wells v. Gates, 6 Mo. App. 242.

[10] Branson v. Turner, 77 Mo. 489.

[11] Mansfield v. Trigg, 113 Mass. 350.

[12] Padden v. Marsh, 34 Iowa, 522; Hall v. Ætna M. Co., 30 Iowa, 215.

[13] Whitlock v. Denlinger, 59 Ill. 96; Laforge v. Matthews, 68 Ill. 328; Baston v. Clifford, 68 Ill. 67; 18 Am. R. 547; McIndoe v. Morman, 26 Wis. 588; 7 Am. R. 96; Harvey v. Morris, 63 Mo. 475.

he has received.[14] If the purchaser has made permanent improvements, enhancing the value of the land, compensation for such improvements and taxes paid must be made to him.[15] If the vendee seeks to recover back the purchase money on account of failure of title, he must account for the value of the use of the premises while he was in possession.[16]

Return Required in Case of Rescission for Nonperformance.—Under certain restrictions the law allows one party to a contract to rescind, if the other shall fail to perform an essential condition of such contract. If the contract be wholly executory no returns are required; but if it has been partially performed it is a condition precedent to rescission that he should return, or offer to the other party, everything received under the contract so as to place the other party as near as may be *in statu quo*.[17] If the vendee, after being placed in possession, desires to rescind he must offer to restore possession to the vendor, and will then be entitled to have the consideration, with interest, refunded to him and to be be reimbursed for improvements placed and taxes paid on the property.[18] If the vendee continues to occupy or use the property after rescinding, he will be chargeable with rents and profits from the time of rescinding, but not prior thereto.[19] If the vendor rescinds after a portion of the purchase money has been paid, he must return the money, but will not be charged with interest thereon.[20] Where a court by its decree rescinds a sale and conveyance of land at the instance of the vendee, a mortgage for the purchase money is rescinded as a necessary consequence.[21]

[14] Harris v. Texas, 37 Tex. 581; Wheeler v. Mather, 56 Ill. 241; 8 Am. R. 683; Gehr v. Hagerman, 26 Ill. 438.

[15] Masson v. Swan, 5 Heisk. 450; Baptiste v. Peters, 51 Ala. 158; Kirkpatrick v. Downing, 58 Mo. 32; McIndoe v. Morman, *supra*. See Coffman v. Huck, 19 Mo. 435; Craig v. Martin, 3 J. J. Marshall, 50; 19 Am. Dec. 157.

[16] McDonald v. Beall, 55 Ga. 288.

[17] Gay v. Alter, 102 U. S. 79; Melton v. Smith, 65 Mo. 315; Burge v. R. Co., 32 Iowa, 101; Pearse v. Com'rs, 5 Blackf. 441; 35 Am. Dec. 151; Haynes v. White, 55 Cal. 38; Hunt v. Silk, 5 East, 449. See Chapman v. Douglass Co., 107 U. S. 348.

[18] Barnes v. Brown, 71 N. C. 507; Worrall v. Munn, 53 N. Y. 185; Luly v. Bundy, 2 N. H. 298; 32 Am. Dec. 359. See E. T. Bank v. First Bank, 7 Lea. 420.

[19] Taylor v. Porter, 1 Dana (Ky. 421; 25 Am. Dec. 155; Dwight v. Cutler, 3 Mich. 566. But see Axtel v. Chase, 77 Ind. 74; Howard v. Shaw, 8 M. & W. 118.

[20] Benson v. Cowell, 52 Iowa, 137.

[21] Coffman v. Huck, 19 Mo. 435.

Mutual Rescission.—The parties to a contract may rescind it upon whatever terms they please, provided the rights of third persons have not intervened. When rescinded by mutual agreement reference must be had to such agreement to ascertain what return the parties are required to make to each other. If the rescinding contract is silent as to what returns are to be made by the parties, it will be presumed that each party is to be restored as near as may be to his former rights.[22] Thus upon the voluntary rescission of a contract for the sale of land, where the vendee had gone into possession and paid the purchase money, it was held that the purchaser was entitled to a return of the purchase money with interest, but must be charged with the rental value of the premises after deducting therefrom the amount which the value of the place had been enhanced by the improvements placed thereon by him.[23] If the rescinding contract requires a particular return to be made before it becomes operative, such return must be substantially performed. Where a deed for a patent right recited that defendant was to pay plaintiff a sum of money unless the contract was rescinded by a return of the patent deed by a certain day, and the deed got lost, but defendant informed plaintiff that it was lost, and that he had renounced all right under the deed, it was held not rescinded.[24] But where G sold stock to B and agreed, if requested, to take it back and return the price B was allowed to recover judgment for the price, without tendering the stock certificate back to G, although he must surrender it to G, or deposit it in court before taking out execution.[25] Where the contract authorized a return of the property, if not fit for a particular purpose, the purchaser, after ascertaining it was unfit for such use and tendering it back, was allowed to recover the purchase price.[26]

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[22] 2 Schouler on Pers. Prop. 653.

[23] Smith v. Stewart, 83 N. C. 406.

[24] Morrow v. Campbell, 7 Porter, 41; 31 Am. Dec. 704. See Chapman v. Searle, 20 Mass. 38; Darabee v. Ovit, 4 Vt. 45; Hoadly v. McLaine, 4 M. & S. 340; Hazard v. Hamlin, 5 Watts, 201.

[25] George v. Braden, 70 Pa. St. 56.

[26] Kimball etc. Co. v. Vroman, 35 Mich. 310; 2 Am. R. 558.

NEGLIGENCE — MASTER AND SERVANT — ACTUAL RELATION OF, MUST EXIST.

McCULLOUGH v. SHONEMAN.

Supreme Court of Pennsylvania, January 24, 1884.

Where the owner of property refused to allow the servants of a third party to carry down through his store some heavy bags of paper, which the said third party had purchased from him, and which were stored in the upper part of the building, but told them they could throw them out of the window, the fact of such instruction does not create such a relation between the owner and the said servants as to render him liable when they do this in such negligent manner as to injure one passing by in the street below.

Error to the Common Pleas No. 4, of Philadelphia County.

Case, by John McCullough against William Hemingway and Louis Shoneman to recover damages for personal injuries alleged to have been sustained by plaintiff through defendant's negligence. Plea, not guilty.

The facts of the case as they appeared at the trial before ARNOLD, J., are fully set out in the report of the proceedings on a motion for judgment on a point reserved in the court below, in 14 W. N. C. 14; and also in the opinion of this court, *infra*.

The jury having found a verdict of $4,000 against both defendants, subject to a point reserved as to the liability of defendant Shoneman, the court subsequently entered judgment in favor of Shoneman on the point reserved, and judgment for the plaintiff against Hemingway alone for the amount of the verdict.

Whereupon plaintiff took this writ, assigning for error the action of the court in entering judgment for the defendant, Louis Shoneman, *non obstante veredicto*.

John G. Johnson, for plaintiff in error.

PAXSON, J., delivered the opinion of the court.

The defendant was sued with William Hemingway, and a verdict rendered against both. The court below reserved the question of Shoneman's liability, and subsequently entered judgment in his favor *non obstante veredicto*. As the jury have found that Shoneman took part in the work and was negligent, the case requires an examination of the testimony to see whether there was sufficient evidence of his participation in the act complained of. If there was, the verdict must stand.

The plaintiff was injured by a large bale of waste paper falling upon him as he was passing along Birch's Place, a small, narrow street. It was thrown from one of the upper windows of defendant Shoneman's store under the following circumstances: Shoneman had a large quantity of waste paper in the upper story of his building. He sold it to the defendant Hemingway, who is a dealer in waste paper and rags. Hemingway sent two men, Dickson and Williams, to Shoneman's store to pack and tie the paper up in bags, and a few days after to take it away. They dropped the bags out of a window, in the side of the store, down to the street, and put them on a wagon. One bag had been thrown down safely, and then a second bag was dropped, which struck and injured the plaintiff. The bags were about six feet high, and weighed about one hundred and seventy-five pounds. It appeared that this was the usual way of getting out the paper. Shoneman told the men not to take it down the stairway; in view of the size of the bags, it was inconvenient if not impracticable to do so; the only way left was for the men to throw it out the window, and Shoneman knew it had been thrown out upon former occasions. He sent his cash-boy, a lad of about sixteen years of age upstairs with them, and there was evidence that the boy told the men to throw the bales out of the window.

This statement of Shoneman's share in the transaction is stated as strongly as it will bear for the plaintiff. Is it sufficient to render Shoneman liable for the injury?

There are three facts here about which there can be no dispute: (1) The building in which the paper was stored belonged to defendant, Shoneman; (2) He had sold the rags to Hemingway, who was to take them away; and (3) Dickson and Williams, the two men who went to Shoneman's store for that purpose, were the servants or agents of Hemingway, and were in his employ at the time the accident occurred.

When, therefore, Dickson and Williams called at Shoneman's store, and were shown the paper, and instructed to take it away, there was a delivery in law and in fact to Hemingway; the title passed to him, and the mere fact that it was still on Shoneman's premises would not make him responsible for the conceded negligence of Hemingway's servants in removing it, unless he (Shoneman) in some way interfered with or directed the manner of said removal. Did he do so? The whole case narrows down to this single point. It is alleged that he either directly, or through the boy that he sent up with the men, directed the bales to be thrown out of the window. Granted. But he did not direct the men to throw them down upon the heads of passers-by. They might have been thrown out with perfect safety, and had been upon former occasions. Had he directed the men to take them down the stairway, and an accident had occurred, would he have been responsible? This is not pretended, yet there would be as much reason to hold him in the one case as in the other. Shoneman had no reason to suppose that the bales would be thrown out of the window carelessly, and so as to injure any one. He had given no such direction, and he was not responsible for the manner of the removal, for the reason that the property was no longer his, and the men were not in his employ. All that Shoneman did was to point out the place of exit from his premises, and surely a property-owner may do this without making himself liable for the negligence of another man's servants in the manner of the removal of the articles.

The case of Stevens v. Armstrong (6 Selden, 345), is in point. There the defendants were merchants in the city of Troy, N. Y. They sold to the Messrs. Plum a box which was in the upper lot of the defendants' store. The Messrs. Plum sent their porter for it. The latter went upon defendants' premises to remove it, and while engaged in lowering the box with a tackle, an accident occurred through the porter's negligence, by means of which the plaintiff was injured. The Court of Errors and Appeals ruled that "the defendants could not be held liable for the negligent acts of the porter, by virtue of the principle applicable to the relation of master and servant, unless that relation in fact subsisted. Knowing and permitting the porter to go into the loft to get the box, being, in fact, at the time the servant of Plum, and actually acting in his employment, did not constitute the porter in any degree the agent or servant of the defendants while engaged in removing the box. The relation of master and servant cannot be created but by contract, express or implied, between the master and servant." The only distinction between that case and the one in hand consists in the fact that in the latter Shoneman directed the bales to be thrown out of the window, which is a distinction without a difference. If, in the New York case, the defendants had directed the porter to lower the box by means, of the tackle, they would not have been responsible for his negligence in doing so any more than Mr. Shoneman is liable for having directed Hemingway's servants to remove the bales by way of the window. I concede that if Shoneman had directed the manner of throwing the bales out of the window, and that if this particular bale had been thrown in accordance with such direction, he would have been responsible. This is as far as the cases go.

The doctrine of *respondeat superior* is at best a severe rule. Were we to give it the construction claimed for it by the plaintiff, we would extend it beyond the authority of any adjudicated case, and further than a sound interpretation of the law requires.

We are of opinion that the learned Judge of the Court below was right in entering judgement *non obstante veredicto* in favor of the defendant, Shoneman.

Judgement affirmed.

NOTE.—See Blackwell v. Wiswall, 24 Barb. 355; Pawlett v. Rutland, etc. R. Co., 28 Vt. 297; McGuire v. Grant, 25 N. J. L. 357; Michael v. Stanton, 3 Hun. 462; s. c. 5 N. Y. S. C. (T. & C.) 634; Fenton v. Dublin Steam Packet Co., 8 Ad. & El. 835; Dalyell v. Tyrer, El. Bl. & El. 906; Blake v. Ferris, 5 N. Y. 48; Quannan v. Burnett, 6 M. & W. 509; Morgan v. Bowman, 22 Mo. 538; Sloane v. Elmer, 64 N. Y. 201, reversing 1 Hun, 310; Hart v. New Orleans, etc. R. Co., 1 Rob. (La.) 180; Stables v. Eley, 1 Car. & P. 614; Woland v. Elkins, 1 Stark, N. P., 272; Kimball v. Cushman, 103 Mass. 194; Wood v. Cobb, 13 Allen, 58; Taylor v. Western Pacific R. Co., 45 Cal. 323; Stevens v. Armstrong, 6 N. Y. 435; Crockett v. Calvert, 8 Ind. 127; Samuel v. Wright, 5 Esp. 263; Dean v. Branthwaite, 5 Esp. 35; Laugher v. Pointer, 5 B. & C. 547.

EQUITY PRACTICE — JURY TRIAL — TAX SALES—INSANITY OF OWNER OF LAND SOLD FOR UNPAID TAXES—VOIDABLE JUDGMENT—INNOCENT PURCHASER.

HEAD v. SACK.

Supreme Court of Missouri, May 12, 1884.

1. In equity the court may send or withhold the issues from a jury, and is not bound to adopt its finding.

2. It is a good ground for setting aside a tax deed, that the owner was insane on the subject of taxation, and refused to pay his taxes on the ground that he had a delusion that Christ had forbidden the payment of tribute except to the the church, and that in consequence he permitted his property to be sacrificed.

3. Judgment for sale of land for unpaid taxes is not assailable collaterally.

4. A judgment against a lunatic is not void, but voidable merely, and a sale upon execution to a *bona fide* purchaser transfers the title and protects it from attack.

Appeal from Johnson Circuit Court.

PHILLIPS, COM., delivered the opinion of the court:

A. J. Head was the owner of certain real estate in Johnson county, which was sold under judgment of the circuit court of said county for unpaid taxes. The defendants became the purchasers at said sale of said lands and received deed therefor. In the tax suit personal service was had on said Head, and the judgment is admitted by this suit to have been regular on the face of the record.

This suit is brought by Head through his guardian, to set aside said deed, and to restore to him his land for the reason alleged that at the time of the accruing of said taxes, as well as the time of service on him, and the rendition of said judgment and the making of said sale, he was of unsound mind, and incapable of transacting such business, etc. Since the sale, Head has, upon due inquest had, been adjudged insane by the probate court of said county.

Tender is made in the petition by plaintiff to defendants of the amount paid by them in said purchase together with the interest thereon and all costs, etc. The answer tendered the general issue as to the allegations of insanity at the time of the proceedings in the tax suit. The court submitted issues to a jury touching the question of insanity, etc. The jury found that the said Head was insane. Therefore the court found the issues for the plaintiff and rendered judgment as prayed in the petition. From that judgment the defendants prosecute this appeal.

1. We do not deem it material to the determination of this appeal to pass upon the propriety of the issues submitted by the court to the jury or upon the correctness of the instructions given though I discover no valid objections to either. The proceeding being one in equity to avoid a judgment, it was optional with the court whether

it would submit any issues at all to a jury. It may or may not adopt the finding of the jury. The case comes here on its merits for review.

2. On a careful reading of the evidence we are satisfied that the court was justified in its conclusion as to the insanity of Head. It is a great misapprehension of the law to suppose that in order to maintain the allegation of the petition, it was necessary to establish either the idiocy or general want of sanity on the part of Head. The subject may exhibit perfect rationality and mental competency in many particulars or on general subjects, yet be readily and even irrevocably insane touching some given matter. As Lord Hale says: "There is a partial insanity of mind, and a total insanity of some persons that have a competent use of reason in respect to some subjects, are yet under a particular delusion in respect of some particular discourse, subject or applications or else it is partial in respect of degrees."

Reason laboring under such delusions or insanity touching some particular subject often possess a degree of subtlety and acuteness on general subjects and sometimes on the subject of their dementia, calculated to baffle the skill of the wisest in discovering their infirmity. Lord Erskine aptly expresses this idea in the celebrated Hadfield trial, "Such patients are victims to delusions which so overpower the faculties and usurp so firmly the place of realities as not to be dislodged or shaken by the organs of preception and sense. Another class branching out into almost infinite subdivisions under which indeed the former and every class of insanity may be classed is where the delusions are not of the frightful character, but infinitely various and often extremely circumscribed, yet where imagination (within the bounds of the malady) still holds the most uncontrollable dominion over reality and fact; and these are the cases which frequently mock the wisdom of the wisest in judicial trials because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of mankind; their conclusions are just, and frequently profound, but the premises from which they reason when within the range of the malady, are uniformly false; not false from any defect of knowledge or judgment, but because a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance because unconscious of attack."

While the evidence shows that Mr. Head on general subjects, was a man of information and intelligence, comprehending the general relation of things, yet upon religious matters, and the right of the civil government to impose taxation upon its subjects, and the obligation of the citizen to submit thereto, he was *non compos mentis*. He could reason, or rather argue about this matter from the Scripture, but his perceptive faculties were so obscure or overcast as to make him incapable of a right conclusion. So intense was his delusion as to the kingdom of Christ, which he believed to be a near establishment, and so incorrigible his mania against temporal authority, that he was wholly irrational, uncontrollable, and, I think, irresponsible as to any business transaction connected with those subjects.

He deemed it sinful to pay tribute, as he termed it, to the temporal powers. And evidently laboring under the delusion that Christ would ultimately restore to him his property taken for taxes, he would take no steps to protect it, nor would he permit any friend to interpose for his protection. Such a man in the particular matter of his dementia is an imbecile, and as much the subject of protection against himself and against any business transactions connected thereto, as if he were a raving madman.

3. What then is the affect of a judgement rendered against such a person, on personal service, without appearance in person, by attorney or guardian *ad litem*? Is it void or simply voidable?

Counsel have referred us to no authority maintaining that the judgment is void, and we can find none so holding.

Taxes are imposed on real estate itself. This imposition is the act of the law, It has not the qualities of a contract. It is imposed without the consent of a concurrence direct of the mind of the land owner. So far as he is concerned, this burden on his estate exists *nolens volens*. By statute, if such taxes remain unpaid for a years time, it is made the duty of the collector to proceed to enforce the payment by suit. Such suit shall be prosecuted "against the owner of the property, and, all notices and process in suits under this chapter shall be sued out, and served in the same manner as in civil actions in Circuit Courts." Secs. 6836, 6837 Rev. Stat. 1879.

Head being confessedly the owner of the land, suit was properly instituted against him. He was the proper party upon whom to serve the writ and the proper party against whom to render the judgment. Process and judgment go against the lunatic as against other parties. They should defend by attorney or guardian *ad litem* in the absence of a guardian proper. Donalson v. Lenox, 6 Dana. 89-90, Walker v. Clay, 21 Ala., 797, Johnson v. Pomeroy, 31 Ohio St. 248; Sagers v. Brent 60 Mo. Baumgartner v. Guessfield 38 Mo. 36.

The court then had jurisdiction over the person of the defendant and the subject matter of the action, on what principle then can it be maintained that the judgment was void?

Judgments rendered pursuant to the statute for the collection of taxes stand on the same footing as any other judgments of the circuit court, and are not assailable collaterally for mere irregularities or errors curable on appeal or writ of error. Wellshear v. Kelly 69 Mo., 343.

The utmost that can be alleged against the judgment is that it is voidable. The contracts of non-sane persons not under guardianship are placed by most respectable authorities on the same basis, as those of infants and therefore by parity of reasoning should alike be voidable. Breckinridge v. Ormsby, 1 J. J. Mar. 238; Lincoln

v. Buckmaster, 32 Vt. 652; Tolson, admr., v. Gamer, 15 Mo. 497; Holly v. Troester, 72 Mo. 73.

The error in rendering judgment against an insane man would not, ordinarily, appear of record any more than in the case of a judgment against a minor. It is an error of misrepresentation of a fact, existing in *pais*, not called to the attention of the court. Such judgment may be reviewed and the error rectified in the court where committed on writ of *coram nobis*. 2 Tidd's Pr. 1130: *Ex parte* Toney, 11 Nev. 662.

To such a motion or writ of error there does not seem to be any limitation as to the time in which it may be invoked. Powell v. Scott, 13 Nev. 459; Gomer v. Smith, 49 Mo. 324.

But this action is in equity and is *res inter alios acta* to set aside the deed made pursuant to the sale under such judgment to the stranger to the record. No doctrine of the law is better settled than that while the title of the judgment plaintiff will be forfeited by a subsequent reversal or vacation of the judgment yet the title of a stranger who in good faith purchased before the reversal of the judgment will not be affected by such reversal. Gott v. Powell, 41 Mo. 420; Vog'er v. Montgomery, 54 Mo. 577.

Such purchasers are protected from secret vices in judgments. When it is sought to vacate a judgment on account of matters extrinsic to the judgment where the purchaser thereunder was not a party to the judgment, it must be averred and proved that the purchaser had notice of such infirmity. Without this he is not affected thereby. Reeve v. Kennedy, 43 Col. 643; Freeman v. Thompson, 57 Mo. 185; Harding v. Lee, 51 Mo. 241.

Mr. Freeman, in his treatise on judgments, sec. 152, says: "While an occasional difference of opinion manifests itself in regard to the propriety and possibility of binding *femmes covert* and infants by judicial proceedings in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more unfortunate and defenceless class of persons, but by a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them are said to be neither void nor voidable. They can not be reversed for error on account of defendant's lunacy, the proper remedy in favor of a lunatic being to apply to chancery to restrain proceedings, and to compel plaintiff to go there for justice."

The following cases support so much of the text as holds the judgment binding as between the defendant in the judgment an innocent purchaser. Johnson v. Pomeroy, 31 Ohio St. 247; Tomlinson v. Devorse, 1 Gill, 345; Stigers v. Brent, 50 Ind. ; Lamprey v. Mudd, 9 Fost. 299; Foster v. Jones, 23 Ga. 168. The cases cited in support of that portion of the text which holds that the only remedy is to ask a court of equity, while the suit for judgment is *in limine* for a restraining order, are Robertson v. Lain, 19 Wend. 650; Clark v. Dunham, 4 Denio, 262; Sternberger v. Schoolcraft, 2 Barb. These last cases, I apprehend, rest upon rulings, having for their foundation a special statute of New York, conferring this jurisdiction on the chancery court. See the discussion of this question in Stigers v. Brent, *supra*. Redfield, C. J., with characteristic learning and a strong sense of justice in Lincoln v. Burkmaster, 32 Vt. , applies the same rule to lunatics as to infants. He says: "When one is in the state of mental unsoundness found in this case he is wholly incapable of making a binding contract as much so as an infant or a married woman. Any other view of the case would be absurd. It certainly shocks all our notions either of justice or reason, and equally of law." He therefore holds that a contract of such person as in the case of an infant, if not within the exceptional case, may be avoided. The Supreme Court of New Hampshire, in Lamprey v. Mudd, *supra*, hold to the same doctrine. If the infant may avoid a judgment against him where his infancy was not disclosed, reason and justice would apply the rule with equal force to a lunatic. If it had been averred and shown in proof that the purchasers at the execution sale had notice of Head's mental condition, or were possessed of such facts as would or ought to put a prudent person on his guard, in purchasing such property, the judgment of the circuit court might be sustained; Matthieson v. McMillan, 9 Vroom. 544. But it is neither averred nor proved that the defendant purchasers had any notice whatever of the extrinsic fact relied on for the impeachment of the judgment.

It is a case of great hardship that so helpless and unfortunate a man as Head was, should thus lose his estate. We would save him of being despoiled, if the law permitted. But the law is the limit of our discretion. It is an infirmity, I think, in the Revenue law, that the right of such persons to redeem under a reasonable time was not reserved, but that was a matter for the legislature.

The petition in this case if denied, may be so amended as to admit proof, if there be any, of defendant's knowledge of Head's mental condition at the time of their purchase.

The judgment of the circuit court is reversed and the cause remanded. All concur.

DIVORCE—DESERTION—WHAT AMOUNTS TO.

WOLF v. WOLF.

New Jersey Court of Chancery.

On April 21st, 1879, a husband so grossly abused his wife that she went to her parent's home. The next day he followed her there, and calling her out of the house, shot her. He then absconded, but was in the summer of 1879, arrested, tried and convicted and sentenced to imprisonment in the State prison for five years, where he was accordingly confined. He was released after this suit was begun. *Held*, that his absence from his wife since April 22d, 1879, was not

"willful, continuous, and obstinate desertion," so as to entitle her to a divorce.

Petition for divorce *a vinculo*.

Mr. G. H. Lambert for petitioner.

The CHANCELLOR delivered the opinion of the court.

The bill was filed August 11th, 1883. The suit is by a wife for a divorce from the bond of marriage for the cause of desertion. The defendant was guilty of acts of great and extreme cruelty to her prior to the 21st day of April, 1879, and on that day he so abused her by choking her that she went home to her parents in Newark, where she and her husband and they then lived. The next day he came to her father's house, and, inducing her to come out on the pretense that he had something to say to her, he shot her. He then absconded from Newark but was afterwards, in the summer of 1879, arrested in Pennsylvania and brought here and put on trial for that offence. He was convicted and sentenced to be imprisoned in the State penitentiary for five years. He was sent there accordingly, and appears to have been discharged after this suit was begun. The question is whether his absence from his wife, was "willful, continued and obstinate desertion." It is impossible to conclude that it is. It cannot be said that during his imprisonment he obstinately and wilfully remained away from her, for he was not able to return to her. He wrote to her during his confinement, but she returned his letters to him unopened. Though he has done nothing for or towards her support during all the time of his absence, he obviously has had no means of doing anything. After his discharge he endeavored to find her, and appeared to be very desirous of doing so. The case made by the proofs does not entitle the petitioner to the divorce which she seeks.

NOTE.—In Apthorpe v. Apthorpe, 29 L. J. (Mat. Cas.) 27, a husband deserted his wife, without reasonable cause, on October 4th, 1854, and never returned to her again. On November 16th, 1856, he was arrested on a charge of felony, and was subsequently convicted and sentenced to four years' penal servitude. Between October 4th, 1854, and November 16th, 1856, he was twice imprisoned for debt—on the first occasion for seven, on the second, for nineteen days. On a suit for divorce for a dissolution of marriage, commenced before the expiration of the term of penal servitude—*Held*, that the husband had been guilty of desertion for two years and upward. See Hews v. Hews, 7 Gray, 279.

In Williamson v. Williamson, L. R. (7 P. D.) 76, the parties were married in January, 1879. A fortnight afterwards, the wife, who had been a domestic, was apprehended for theft, convicted and sentenced to six months' imprisonment. On her discharge, she did not return to her husband, but went out again to service as a domestic. While there, and in October, 1879, she asked her husband to live with her again, but he refused, owing to her misconduct. In November, 1881, he discovered that she had been living in adultery with one B since May, 1880. *Held*, that her criminal conviction was no justification for her husband's refusing further cohabitation with her, but that as such refusal did not conduce to her adultery, he was entitled to a divorce therefor.

In Townsend v. Townsend, L. R. (3 P. & D.) 129, a husband, having committed several thefts, separated from his wife, with her knowledge and consent, for the purpose of avoiding arrest. He was afterwards apprehended and imprisoned, and having committed other thefts after his release he was again imprisoned. While he was confined, and also in the interval between his imprisonments, he kept up a correspondence with his wife, and made repeated endeavors to induce her to return to cohabitation, which she refused. *Held*, that there was no desertion, the separation being involuntary on the part of the husband.

In Sharman v. Sharman, 18 Tex. 521, that the husband had committed forgery, for which he had been convicted and sentenced to the penitentiary for seven years, where he was confined when his wife's bill for divorce for desertion was filed, and that the wife was left without any means of support except from her father, was held not good cause for divorce.

In Greenlaw v. Greenlaw, 12 N. H, 200, a statute providing that divorces should be decreed in favor of the innocent party, when the other had been convicted of a felony and actually imprisoned therefor, was held not to authorize a divorce where the party had been convicted and imprisoned before the passage of the act. See Scott v. Scott, 6 Ohio, 534; Clark v. Clark, 20 N. H. 380; State v. Deaton, 65 N. C. 496; Cole v. Cole, 27 Wis. 531; Sherburne v. Sherburne, 6 Me. 210; Buckholts v. Buckholts, 24 Ga. 238. In Thomas v. Thomas, 51 Ill., the commission of a crime, without conviction therefor, was held insufficient. Also Lucas v. Lucas, 2 Tex. 112; Foy v. Foy, 13 Ired. 90. In Hoffmire v. Hoffmire, 3 Edw. Ch. 173, 7 Paige, 60, a husband, who had committed adultery, was afterwards convicted and imprisoned for a felony. *Held*, that the misconduct for which he was imprisoned "operated as an abandonment of his duty towards his wife," so as to revive her right to sue for a divorce for his adultery, and that the decree would not be opened to enable him to show condonation previous to his imprisonment. In Small v. Small, 57 Ind. 568, a wife prosecuted her husband for an atrocious assault and battery on her, with intent to kill her, she being then pregnant, and thereby causing a miscarriage of the child. He was acquitted. *Held*, that the prosecution was not "cruel and inhuman treatment" entitling him to a divorce. See Woodruff v. Woodruff, 11 Me. 475.

In Porritt v. Porritt, 18 Mich. 420, a wife brought a suit for divorce for cruelty and habitual drunkenness, which was granted by the circuit court, but, on appeal, reversed by the supreme court. Pending these proceedings, the husband made a criminal charge against his wife of attempting to take his life by poison. She was tried thereon and acquitted. *Held*, that the time during which all these proceedings were going on, and during which the wife did not cohabit with her husband, should not be estimated in three and a half years' separation necessary to constitute desertion.

In Ahern v. Easterby, 42 Conn. 546, the plaintiff was sent to jail for four months for an assault upon his wife, by which she was disabled from work. He took with him all his money, making no provision for her. She had no means of support, and sold a stove belonging to her husband to one who knew her destitute condition, and used the money to buy necessaries. *Held*, that the husband could not, afterwards, maintain replevin against the purchaser of the stove. See Edgerly v. Whalen, 166 Mass. 307.

In Gustin v. Carpenter, 51 Vt. 585, a married woman, whose husband was insane and confined in an asylum in another State, was held competent to sue in her own name for slander. See Abell v. Light, 1

Han. (N. B.) 97; Wray v. Cox, 24 Ala. 337; Grant v. Grant, 41 Iowa, 88; Read v. Legard, 6 Exch. 636; Richardson v. DuBois, L. R. (5 Q. B.) 51; Davidson v. Wood, 1 De G., J. & S. 465; Alexander v. Miller, 16 Pa. St. 215.

In Bradford v. Abend, 89 Ill. 78, a wife confined in an asylum in another State was held incapable of prosecuting a suit for divorce against her husband. See Worthy v. Worthy, 36 Ga. 45. In Newcomb v. Newcomb, 13 Bush. 544, a husband was held incapable of suing his wife for a divorce while she was confined by him in a lunatic asylum in another State, and the decree granting him a divorce was set aside after the husband's death. In Wray v. Wray, 33 Ala. 187, a wife, who was insane and confined by her husband in an asylum in another State, was held entitled to alimony, although she had committed adultery while insane, and a divorce had been refused to her husband therefor in Wray v. Wray, 19 Ala. 522. See Smith v. Smith, 6 Stew. Eq. 458; Alna v. Plummer, 4 Me. 258; Delaware v. McDonald, 46 Iowa, 170; Harris v. Davis, 1 Ala. 259; Noble Co. v. Schmoke, 51 Ind. 416; Wertz v. Wertz, 43 Iowa, 534; Baker v. Baker, 82 Ind. 146; Meyer's Estate, Myrick (Cal.) 178; Goodale v. Brocknor, 61 How. Pr. 451; Hill v. Hill, 12 C. E. Gr. 214. In Douglass v. Douglass, 31 Iowa 421, a statute provided that if a husband wilfully deserts his wife, and absents himself without reasonable cause for two years, she will be entitled to a divorce. Where a husband deserted his wife while sane, it was held that he could not excuse his subsequent absence for the statutory period by showing that, during the two years, he became insane and was confined in an asylum. See Rathbun v. Rathbun, 40 How. Pr. 328.—

JOHN H. STEWART.

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—ON BOND OF GUARDIAN—SETTLEMENT.
A ward need not wait for the final settlement of his guardian, before he may sue him on his bond for maladministration. *State v. Roeber*, S. C. Mo., June 21, 1884.

2. ATTACHMENT—CUSTODIA LEGIS—MONEY TAKEN BY SHERIFF FROM PRISONER.
Property and money taken from the person of a prisoner by the sheriff upon an arrest made by him under a warrant can not be levied upon by him to satisfy a writ of attachment in his hands against the prisoner. *Commercial Ex. Bank v. McLeod*, S. C. Iowa, April, 1884; 17 Rep. 785.

3. ATTORNEY AND CLIENT—MEASURE OF COMPENSATION.
In determining the reasonable value of an attorney's services, the jury should consider the character of the litigation in which the same were rendered; the novelty, difficulty and importance of the questions involved; the value of the rights or property in controversy; the attorney's position in the case as leading or assistant counsel, and the degree of responsibility resting upon him; the length of time necessarily consumed by the trial and other court proceedings; the fact, if it be a fact, that compensation is wholly contingent upon success, and the manner in which his duties are performed. *Leitensdorper v. King*, S. C. Cal. May 16, 1884; 3 W. C. Rep. 135.

4. ATTORNEY—RIGHT TO COMPENSATION FOR DEFENCE OF CRIMINAL.
An attorney has no claim against a county for defending an accused to whose defence he was assigned by the court. *Johnson v. Whiteside Co.*, S. C. Ill., May 19, 1884; Reporter's Head Notes.

5. BILLS AND NOTES — CHECK IS BILL OF EXCHANGE.
A check is a "bill of exchange," within the meaning of statutes relating to the latter. *McLean v. Clydesdale Banking Co.*, Eng. H. L.; 50 L. T. N. S. 457.

6. BY LAWS—PROHIBITION OF NUISANCES.
A by-law forbidding the keeping of pigs within fifty feet of a dwelling house, is in the rural districts unreasonable and void. *Heap v. Burveley*, Eng. H. Ct. Ch. Div. March 23. 1884; 48 J. P. 359.

7. CONSTITUTIONAL LAW—EFFECT OF REFUSAL OF SENATE TO CONFIRM TEMPORARY APPOINTEE FOR PERMANENT APPOINTMENT.
The temporary appointment of a person to an office by the President of the United States is not terminated by the refusal of the Senate to confirm him for the permanent appointment, and the powers of a suspended officer whose position he occupies are not revived by such refusal. *In re Marshalship, etc.*, U. S. C. C. M. D. Ala. Feb. 1884; 20 Fed. Rep., 379.

8. CONTRACT—CONSTRUCTION—SALE OR AGENCY.
A contract between two parties whereby one is to furnish money to be used by the other in the purchase of corn, such corn to be the property of the former, marked with his name, and sold by him, he receiving out of the sales his original investment, with 8 per cent. interest, and one cent a bushel on the corn besides, the other party to receive the balance and to guaranty the other against loss in the transaction, is a contract of agency and not of loan. *Van Sandt v. Dows*, S. C. Iowa, June 4, 1884; 19 N. W. Rep. 669.

9. CONTRACT—DURESS—HUSBAND AND WIFE.
A mortgage executed by a wife upon her separate estate, to secure a debt owing by the husband for money embezzled by him, is not executed under duress, although done to prevent his being convicted and sent to the penitentiary. *Mundy v. Whitmore*, S. C. Neb. May 29, 1884; 19 N. W. Rep. 694.

10. CONTRACT—FALSE WEIGHTS—PARTIES HOW FAR BOUND BY.
Where a party buys cattle, to be weighed on the vendor's scales, and to be paid for at so much a pound, the vendee is not bound by such scales, but if it prove that such scales were out of order, he may recover back the sum which he paid or

the number of pounds which he did not, by correct weight, receive. *Clifton v. Sparks*, S. C. Mo. June 16, 1884.

11. CORPORATION — INDIVIDUAL LIABILITY OF STOCKHOLDER—NOT LIABLE WHEN STOCK HELD AS COLLATERAL SECURITY.
When one makes advances to a corporation of money to aid it in the construction of its road, its bonds being placed in the hands of the lender as collateral security, for him to dispose of in the market, and the corporation executes a deed of trust to the lender as trustee to secure such bonds, and gives him a certificate of stock, for a large number of shares, entering him as a stockholder, "in record," and he voted afterwards on such stock, but the whole transaction was one, i. e., to aid the corporation in the construction of its road and to enable such lender to negotiate its bonds and stock, such lender is not liable as stockholder to a creditor of the corporation. *Union Sav. Ass. v. Seligman*, S. C. Mo., June 9, 1884.

12. CRIMINAL EVIDENCE — BURDEN OF PROOF — ALIBI.
The burden lies on the government to prove the falsity of the defendants *alibi* beyond reasonable doubt. *Mullins v. People*, S. C. Ill. May 19, 1884; Reporter's Head Notes.

13. CRIMINAL LAW—VARIANCE.
When an indictment for selling liquor charges a sale to persons unknown to the grand jury, and it appears that the purchase proved at the trial was known to the grand jury, the offense alleged is not proved. *Yost v. Commonwealth*, Ky. Ct. App., May 14, 1884.

14. DIVORCE—A DESERTION—WHAT IS.
Where a husband, having by marriage precluded himself from all marital rights in the wife's property, abandoned her because she would not sell her city property, purchase in a distant county and remove, the wife became entitled to a divorce on account of the abandonment. *Hughart v. Hughart*, Ky. Ct. App.; May 20, 1884.

15. DOWER—RELEASE—CONSTRUCTION.
A joinder by a wife in her husband's deed "in order to release her rights under the homestead exemption act," is no release of dower. *Tyrrell v. Kennedy*, S. J. C. Mass., 7 Mass. L. Rep., June 19, 1884.

16. EMINENT DOMAIN—DESTRUCTION OF RIPARIAN RIGHTS—DAMAGES.
1. The appropriation of water by a city, to the destruction of riparian rights, is a taking of private property for public use. 2. Although the damage from such taking is made evident after bringing suit, the damage was all done by the taking, and should be assessed entirely in such suit. The mere fact that the suit only made such damage apparent, does not affect the plaintiff's rights. *Myers v. St. Louis*, S. C. Mo. June 16, 1884.

17. EMINENT DOMAIN—MUNICIPAL CORPORATIONS—POWER OVER CONDEMNED PROPERTY.
A city which has condemned land for wharf purposes, may lease the same to an elevator corporation for the purpose of permitting the erection of an elevator thereon, but it must reserve a control over the building or business, to the end that it may do anything which it might have done if the lease had not been made; if such reservation be not made, the lease is void, as an appropriation of condemned property to private use. *Belcher etc. Co. v. St. Louis, etc. Co.* S. C. Mo.; June 16, 1884.

18. EQUITY—BOARD OF TRADE—SEAT IN.
A seat in a board of trade is property which a court of equity will recognize, and it will compel its transfer by one who wrongfully holds the certificate thereof to its owner. *Weaver v. Fisher*, S. C. Ill., May 19, 1884; Reporter's Head Notes.

19. ESTOPPEL—FALSE REPRESENTATIONS OF MAJORITY.
A minor is not estopped by recital in his deed that he is "of age," to avoid his deed for infancy. *Wieland v. Koebick*, S. C. Ill., May 19, 1884. Reporter's Head Notes.

20. EVIDENCE—COMPETENCY OF CO-DEFENDANT AS WITNESS.
A co-defendant, after his plea of guilty and sentence, is a competent witness for the other defendant. *State v. Long*, S. C. Mo., June 16, 1884.

21. EVIDENCE — GUARDIAN'S ACCOUNT—NOT ADMISSIBLE FOR HIM.
Guardian's annual settlements are not *prima facie* evidence for him of his receipts and disbursements in a suit on his bond. *State v. Roeper*, S. C. Mo., June 21, 1884.

22. EVIDENCE — DEFENDANT'S WEALTH — SEDUCTION.
In an action for breach of promise of marriage the wealth of the defendant may be taken into account; but in seduction the object is the compensation of the wrong to the plaintiff; and as the defendant may not show his poverty in mitigation of damages, his wealth should not be shown, and liberty given the jury to punish the defendant besides compensating the plaintiff. *Watson v. Watson*, S. C. Mich., Mar. 6, 1884; 29 Alb. L. J. 492.

23. EXTRADITION—DEMAND FROM INDIAN NATION.
The governor of a State has no power to honor the demand from the Cherokee Nation for the extradition of one who has violated the laws of the nation. Only States and territories have such right to demand. *Ex parte Morgan*, U. S. C. C. W. D. Ark.; 20 Fed. Rep., 298.

24. FRAUD — UPON CREDITORS — DIVORCE — ALIMONY.
Pending a divorce suit, a wife asserting a just claim for alimony is to be deemed a creditor within the meaning of the statutes prohibiting fraudulent conveyances. *Lott v. Kaiser*, S. C. Tex., May 30, 1884; 3 Tex. L. Rev., 365.

25. GARNISHMENT—UNPAID SUBSCRIPTIONS—STIPULATIONS INEFFECTUAL.
A stockholder is subject to garnishment for the full amount of his unpaid subscription, even though he had a stipulation with the corporation that he should not be liable to assessment for more than fifty per cent. thereof. *In re Glen Iron Works*, U. S. C. C. E. D. Pa., June 6, 1884; 41 Leg. Int. 243.

26. INJUNCTION—DAMAGES—NOT TO BE ASSESSED IN EQUITY.
Where no temporary injunction is sought or obtained in a suit in equity, and no bond given but a final injunction is obtained which is afterwards reversed by this court, there is no power in the same proceedings to assess the damages incurred by the respondent by reason of the injunction. *City of St. Louis v. St. Louis Gas L. Co.*, S. C Mo., June 16, 1884.

27. JUDGMENT—VACATING—CAUSES FOR.
Where a debtor pays a portion of the debt on execu-

tion, and makes a collateral indefinite promise to give the creditor future employment, whereupon the creditor satisfies the judgment, upon failure to give the employment promised, the remedy is by action for breach of contract, and not by striking off satisfaction of the judgment, or by trial of an issue upon the judgment. *Hendrick v. Thomas*, S. C. Pa., May 19, 1884; 14 Pitts. L. J. 459.

28. JUDICIAL NOTICE — OF DURATION OF COURT SESSIONS.
While judicial notice will be taken of the time fixed for the commencement of the session of a court of record, such like notice cannot be taken of the duration of any particular session of such court. *I. & G. N. R. Co. v. Timmerman*, S. C. Tex., May 30, 1884; 3 Tex. L. Rev. 387.

29. JUDICIAL SALES—TITLE OF PURCHASER—IRREGULARITIES.
The title of a purchaser in good faith is not affected by errors in the suit not going to the jurisdiction of the court. *Hannas v. Hannas*, S. C. Ill., May 19, 1884. Reporter's Head Notes.

30. JURISDICTION—AMENDMENT.
Where certain facts are essential to give a justice of the peace jurisdiction of a suit, are omitted in the petition, they may be supplied by amendment and proof at the trial. So held in an action for killing stock in an adjoining township. *Mitchell v. Mo. Pac. R. Co.*, S. C. Mo. June 21, 1884.

31. LIMITATIONS—ACKNOWLEDGMENT OF EXISTING LIABILITY.
The debtor wrote and sent a letter to the plaintiff creditor within less than four years next before the commencement of the action on the account, saying: "If ever I get able I will pay you every dollar I owe to you, and all the rest. You can tell all as soon as I get anything to pay with I will pay. As for giving a note it is of no use. I will pay just as quick without a note as with it." *Held*, that the letter acknowledged an "existing liability," and thereby took the case out of the operation of the statute of limitations. *Deveraux v. Henry*, S. C. Neb., May 28, 1884; 19 N. W. Rep. 597.

32. LIMITATION—TRUSTEE—ADVERSE POSSESSION.
Where a trustee, in whom is vested the legal estate in land, is barred by limitation, the *cestui que trust* is also barred, notwithstanding his infancy. *Barclay v. Goodloe*, Ky. Ct. App., May 22, 1884.

33. MARITIME LIEN—STEVEDORES — WORKMEN — COLLATERAL PROMISE.
The work of a stevedore in loading or unloading cargo is a maritime service, within the definition of the supreme court in Ins. Co. v. Dunham, 11 Wall, 26. It is maritime because it "relates to a maritime transaction," and is rendered in the discharge of the maritime obligation which the ship owes to the goods. *Held*, therefore, that a lien should no longer be denied to workmen rendering stevedore's service to foreign vessels. *The Hattie M. Barr v. U. S. D. C. S. D.*, N. Y. May 21, 1884; 20 Fed. Rep. 389.

34. MORTGAGE—ASSIGNMENT—EQUITIES.
The assignee of a mortgage securing a negotiable promissory note, who takes it in good faith, before maturity, for value, takes it as he does the note, free from equities between the original parties. *Mundy v. Whitmore*, S. C. Neb., May 29, 1884; 19 N. W. Rep. 694.

35. NEGLIGENCE — CONTRIBUTORY — EVIDENCE — CUSTOM.
Where the question is whether the deceased was guilty of contributory negligence in riding on the top of a car, the plaintiff may prove a usage by which all stock passengers so traveled, or were obliged to travel, to save them from walking on a dangerous track. *Tibby v. Mo. Pac. R. Co.*, S. C. Mo. June 21, 1884.

36. NEGLIGENCE—LIABILITY FOR NEGLIGENCE OF CONTRACTOR—NUISANCE.
Taking down the walls of a burned building is not the abatement of a nuisance nor the commission of a nuisance, and if the owner thereof employ a contractor to do the work, he is not liable for such contractor's negligent performance of the work. *Dillon v. Hunt*, S. C. Mo., June 21, 1884.

37. NEGLIGENCE — RAILROAD — DUTY TO CATTLE OWNERS.
Except in going over crossings, a railroad owes no duty except to its passengers to regulate its speed; no rate of speed is negligence *per se*. And it is not liable to the owner of cattle injured on its track, unless its servants knew or had reason to know that cattle frequented its track in the district whatever rate of speed they employed. *Lord v. C. etc. R. Co.*, S. C. Mo., June 21, 1884.

38. NEGLIGENCE—RINGING BELLS.
Ringing bells or sounding whistle is not always all that is required of railroads at crossings; the jury is justified if they believe that it should, in the exercise of due care, have taken further precautions in finding it still guilty of neglect. *Texas etc. R. Co. v. Howard*, S. C. Tex. June 3, 1884; 3 Tex. L. Rev. 382.

39. NOTICE—CONSTRUCTIVE—WHAT ENTITLED TO RECORD.
Notes given by a vendee to the vendor, for the purchase money, and in which it recited that the vendor retains a vendor's lien upon the land are "contracts in writing relating to land," proper for registration, and, therefore, notice to the world of the payee's rights. *Saunders v. Hartwell*, S. C. Tex. June 3, 1884; 3 Tex. Rev. 378.

40. PARTNERSHIP—CONSTRUCTION OF AGREEMENT.
An agreement whereby one party agrees to buy cattle with his own money, to furnish so many acres of land, the other party to furnish "balance of pasture" and a certain sum, expense of feeding to be allowed the former out of profits, if any, "and if not to be made up by" the latter, and the profits to be then equally divided, does not create a partnership. *Ashby v. Shaw*, S. C. Mo., June 21, 1884.

41. PATENTS — INVENTION — COMBINATION — MECHANICAL SKILL.
A patent will not be granted where there is not a clear invention. No degree of skill in the workman in combining well-known expedients will justify the issuing of a patent. *Phillips v. Detroit*, U. S. S. C, May 5, 1884; 17 Rep. 772.

42. PLEADING— FORECLOSURE — QUESTIONS TRIABLE IN.
In a proceeding for foreclosure, the question of the priority of the plaintiff's mortgage over a judgment lien and execution sale of the premises cannot be tried. *The Emigrant etc. Bank v. Clute*, S. C. N. Y., June, 1884, 25 Daily Reg. 1145.

43. PLEADING—GENERAL DENIAL—MALICIOUS PROSECUTION.

Under the general denial in malicious prosecution, the defendant may prove that he consulted an attorney-at-law and laid all the facts before him, by way of proof of probable cause. *Folger v Washburn*, S. J. C. Mass., 7 Mass. L. Rep., June 19, 1884.

44. REMOVAL OF CAUSES—AMOUNT IN DISPUTE.

To warrant the removal of a cause from the State to the Federal courts, the amount in dispute at the commencement of the action must exceed $500, not at the time of filing the petition for removal. *Carrick v. Landman*, U. S. C. C. N. D. Ala., April, 1884, 20 Fed. Rep. 209.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

1. A husband owns two-thirds undivided interest in a tract of land. The wife owns the remaining one-third undivided interest. They together execute a deed conveying "their undivided one-third interest" in the land. As between the husband and wife or their heirs, what interest was conveyed, and what interest did the wife own after the conveyance, if any? Cite authorities. D.

2. A employs B to go upon A's land, which was uninclosed and cut down trees, and cut up into cord wood. While so employed B felled a tree upon a valuable cow of C that was grazing upon the land where B was chopping. B is not very bright. Can C recover of A for value of the said cow killed by B while so employed by A? If so state authorities. It all occurred in Indiana. J.

3. In vol. 16, p. 419, C. L. J. in answer No. 2 to query 36, the writer "F," of Springfield, Mo., says the doctrine of Van Renselaer v. Kearney, 11 Howard, 297, in relation to estoppels of married women who have joined in conveyances by their husbands, have been adopted in Missouri, Illinois and Arkansas. A case is now pending in the Supreme Court of this State which involves this question. I have been unable to find any case in our reports, or any statute of Illinois which holds that a woman who simply releases her right of dower in the lands of her husband is thereby estopped from setting up an after acquired title. "F," or any other, will confer a favor by giving the authorities. B.
Fairfield, Ill.

4. Under the 5th section of the Homestead law of Missouri, passed in 1865, the fee to the homestead passed to the widow with the right of possession jointly with her in the minor children, until they should come of age, which right of possession in the minor children should cease on their arrival at age. The widow marries, moves away from the homestead, takes with her the minor children, and acquires another homestead. Part of the children arrive at full age, and the widow dies, and the old homestead is in possession of a trespasser. Who is entitled to recover the minor children in right of their father or all the children in right of their mother? Give authorities.
Osceola, Mo. MEAD & NEAL.

QUERIES ANSWERED.

Query 52. [18 Cent. L. J. 419.] A in a deed to B of one of four lots reserved to himself, his heirs and assigns a right of way over the granted premises, the said right of way to embrace a strip between a point inside of a brook, and the boundary line of the parcel granted. A afterwards granted the other lots to other parties, together with all appurtenances thereunto belonging. Query, did such other grantees derive any interest in such reserved right of way either by such reservation or by grant from A? Was such right of way an easement in gross, or one appurtenant to the remaining lots which were mentioned only by way of boundary? If appurtenant was it divisible and capable of transfer to as many as A might see fit to grant it as incident to a parcel granted? Suppose there was no other means of egress from the remainder of the land, except by trespassing over other land, did a way of necessity arise over the premises over which the right of way was reserved, even if the reservation gave no right to the subsequent grantees? Suppose again that such way by necessity to be utilized, would have to be supplemented by a trespass, not objected to by the party interested, would it lie in the mouth of the first grantee to set up such trespass or would this fact make any distinction? Have A & B the right to make such right of way, reserved as narrow as they see fit?

Answer. A right of way may be created by grant reservation, Boyce v. Brown 7 Barb. 80. A reservation can operate only in favor of the grantor, and not to a stranger, 2 Washb. R. P. 646 (side page;) Bridger v. Pierson, 1 Lans. 481 Brosart v. Cortell. 27 Iowa 288. But if others have honorably acquired legal or equitable rights in the land, a reservation may enure in their favor, Illinois &c. v. Indiana &c. 85 Ill. 211. If the grantor fails to use proper words of inheritance in describing the right reserved it will not extend beyond his life time, Handy v. Foley, 121 Mass. 258. Dennis v. Wilson, 107 Id. 591. But a reservation to him "or" his heirs construed to him "and" his heirs, White v. Crawford 10 Mass. 183. The acceptance of a deed reserving an easement subjects the land both in the hands of the grantee and those claiming under him to the easement reserved, Atkins v. Bordman 43 Mass. 457. A right of way is *in gross* when it is limited to a particular person without regard to the use or occupation of other lands, Washb. Eas. 217 It is a mere personal right, not assignable or transmissible by descent, 1 Add. on Torts 116. He cannot confir the enjoyment of it even on a partner, 3 Kent 420. Ways are appurtenent when they are incident to an estate, one terminous being on the land of the party claiming it. They must concern the premises and be esssentially necessary to their enjoyment. Bowen v. Connor, 6 Cush. 132 Washb. on Eas, 217. They are of the nature of covenants running with the land and must concern the estate conveyed Sanxay v. Hunger, 42 Ind. 44. It cannot be turned into a way in gross because it is inseparably united to the land to which it is incident, Boatman v. Lesley, 23 O. St. 614. A way is not to be presumed to be *in gross* when it can be fairly construed to be appurtenant, Sanxay v. Hunger, supra; Dennis v. Wilson, supra; Spensley v. Valentine, 34 Wis. 154. If the grantor would have no occasion to use such way for any purpose other than for access to or egress from his other land the inference would seem to be inevitable that it was intended to be appurtenant, Dennis v. Wilson, supra. The situation of the different parcels

and their relation to each other are to be considered in determining whether the way is *in gross* or appurtenant, Peck v. Conway, 119 Mass 546. The fact that it abuts on the grantors land and connects with a public way, enabling the grantor to obtain the enjoyment of lands not granted creates a presumption that it is appurtenant, Handy v. Foley, sup. Huttemeier v. Albro, 18 N. Y. 48. When it was urged that a reserved way connecting lands which the grantor afterward sold with a public road, was not appurtenant the court said:"A way is a means of passage from some place to some place. A way which leads to no place or object to which a person has an interest or right to go is not a way. * * * Unless appurtenant to the land his way was a useless *cul de sac*, Dennis v. Wilson, supra; See Mendell v. Delano, 7 Metc. 176. If the way was used for a long time to gain access to land and was useful and convenient the inference would be that it was appurtenant, Leonard v Leonard, 84 Mass 543. "The grant of anything carries an implication that the grantee shall have all that is necessary to the enjoyment of the grant so far as the grantor has power to give it"—Salisbury v. Andrew, 19 Pick. 250 to same purport, Thayer v. Payne, 2 Cush, 325; Hathorn v. Stinson, 25 Am. Dec. 223, (10 Me. 224;) 3 Kent, 420. A way which is appurtenant to a lot passes by a conveyance of the lot without being named and although the term "appurtenance" be not used. Voorhees v. Burchard, 55 N. Y. 38; Atkins v. Bordman, *supra*; 2 Washb. R. Prop. 29 (side page.) The use of the word appurtenance in a conveyance will not create an easement where one does not already exist; Gayette v. Bethune, 14 Mass. 49. By that term only existing easements pass; Parsons v. Johnson, 23 Am. R. 150 (68 N. Y. 62); Stickler v. Todd, 13 Am. Dec. 428 (10 S. & R. 63) and note. Conveying one tract with free use of a roadway over another, makes the roadway an appurtenance. Bangs v. Parker, 71 Me. 458. See Koelle v. Kuecht, 99 Ill. 396. While a right of way appurtenant will pass by deed conveying the land it will not by a separate quitclaim deed. Moore v. Crose, 43 Ind. 30. A right of way for one purpose does not authorize its use for other purposes; Valley F. Co. v. Dolan, 9 R. I. 489; Ballad v. Dyson, 1 Taunt. 279; 2 Washb. R. P. 50-54; and if reserved for the accommodation of one tract it cannot be used for the benefit of another. 2 Washb. R. P. 29 (side page); Stearns v. Mullin, 4 Gray, 151; N. Y. Life Ins. Co. v. Milnor, 1 Barb. Ch. 353; Lewis v. Canstairs, 6 Whart. 193. If appurtenant it attaches to every part of the estate and if the estate be divided will exist in each of the parcels, so far as applicable. Hills v. Miller, 3 Paige, 256; Lansing v. Wiswall, 5 Denio. 213; Underwood v. Corney; 1 Cush. 285; Watson v. Bioren, 7 Am. Dec. 617 (1 S. & R. 227); Child v. Chappell, 5 Seld. 246; Lampman v. Wilks, 2 N. Y. 505. A conveyed to B a tract bounding it on a strip, called a street in the deed, belonging to A; B deeded a part of his to C, the part deeded not abutting on the way. *Held*, that as C had no way over the part retained by B either by grant or necessity, the way did not attach to C's parcel. Dawson v. Ins. Co., 15 Minn. 133. If one of the abutters obstructs passage on his side so as to drive all the travel to the other, this does not impose a new or greater burden on it. Dempsey v. Kipp, 61 N. Y. 462. If the dominant estate be subdivided but the several parcels abut on the way each parcel, however small, has an equal right over the way. Walker v. Gerhard, 9 Phil. 116. And may be used for any purpose to which it might from time to time be legitimately applied. Gunson v. Healey, 100 Pa. St. 42. But not if it imposes a greater burden. Atwater v. Bodfish 11 Gray, 150. That the way was used for all purposes previously required raises a presumption that it was a way for all purposes. Parks v. Bishop, 120 Mass. 340; Sargent v. Hubbard, 102 Id. 380. A grant which bounds the land on a private road confers the right to use the way to reach any part of the land which was made accessible thereby. Miller v. Washburn, 117 Mass. 371. If the land be described as bounded by a private way, such way becomes appurtenant. Franklin, etc. v. Consen, 127 Mass. 258; Lewis v. Beattie, 105 Id. 410; Smiles v. Hastings, 22 N. Y. 217. A right of way by necessity arises when the premises granted are entirely surrounded by other lands of the grantor. Nichols v. Luce, 85 Am. Dec. 302 (24 Pick. 102); Brown v. Burkenmeyer, 33 Am. Dec. 541 (9 Dana 159); Mitchel v. Siepel, 36 Am. Rep. 404 (53 Md. 251), and note. It has been doubted whether a way of necessity arises where the granted land is surrounded in part by lands of others than the grantor. Kuhlman Hecht, 77 Ill., 570; Gayette v. Bethune, 14 Mass. 54. But it seems to be settled that the circumstance will not prevent the right from arising. Mitchell v. Siepel, *supra*. Nichols v. Luce, *supra*; 3 Cruise Dig. 111 (side page); Brown v. Berry, 6 Coldw. 98. If the grantee can reach any street from his land without going over the land of others, no way of necessity arises. Oliver v. Pitman, 98 Mass. 46; Parsons v. Johnson, *supra*; 3 Kent 420. So if he reach it by water or distant or difficult road. Lawton v. Rivers, 13 Am. Dec. 741, (2 McCord, 445). See 15 Am. Dec. 622. A bluff exceedingly difficult to pass may create the right. Nichols v. Luce, *supra*. But see Cooper v. Maupin, 36 Am. Dec. 456, (6 Mo. 524) and note. A necessity way ends when the party acquires a new way. Carey v. Rae, 58 Cal. 159; Oliver v. Hook, 47 Md. 301; McDonald v. Lindell, 3 Rawle, 492. But see Myers v. Dunn, 49 Conn. 71. Grant of the use of an alley, laid off for the common use of four lots. *Held*, to include the right of entrance to or exit from the ends thereof, if not obstructed by the adjoining proprietors. Bump v. Sanner, 37 Md. 621. A party can not claim a right of way under a deed to which he is a stranger, there being no privity of estate. Oliver v. Pitman, *supra*.

Now, if A in deeding to B reserved the way across B's lot for the use of the other lots the way would be appurtenant to such lots. A's conveyance of those lots would confer on such grantees as abutted on this way an unquestionable right to use the same. If all the lots did not abut on the way, a way of necessity might arise over the intervening lot to such way and over that as an appurtenant to the public road. See Leonard v. Leonard, *supra*, when it was held that a proscriptive right of way and way of necessity passed. That a grantee in obtaining access to the way trespassed on the lands of others could not affect his rights after he got in the way. If the way reserved was too narrow to allow the beneficial enjoyment of the land, a way of necessity would still arise.

Hamilton, Mo. CROSBY JOHNSON.

Atlanta, Ga.

Query 57. [18 Cent. L. J. 499.] Where a corporation is plaintiff in a civil suit, should the justice grant a change of venue, where the affidavit is regular, but made by plaintiff's attorney, or must an affidavit for change of venue be made, by some officer of the corporation? E.

Answer. In answer to query No. 57 in your issue of June 20th, let me suggest the following: When a corporation (or any other person) is plaintiff in a civil suit, before a Justice, an application for a change of venue would (in Illinois) be denied; because no provision is made here for such an application except om the defendant, as the plaintiff has his choice of

the venue when he begins his action. In case the corporation were defendant in the suit the application may be made by the defendant supported by the affidavit of the defendant, its agent or attorney, the same as in other cases. SILAS W. PORTER.

RECENT LEGAL LITERATURE.

INSANITY AS A DEFENCE TO CRIME.—The ad judged cases on Insanity as a Defence to Crime with notes. By John D. Lawson. Author of "The Law of Expert and Opinion Evidence," "A Concordance of Words, Phrases and Definitions," "Usages and Customs," "Leading Cases Simplified," The Contracts of Common Carriers," etc., etc.

"There is, perhaps, no subject connected with common law upon which the authorities are more hopelessly in conflict than this." Cunningham v. State, 56 Miss. 269. St. Louis: F. H. Thomas & Co., 1884.

Nothing gives us so much pleasure as the perusal of a volume from the pen of Mr. Lawson, who has now secured national fame with his many books, and is likely to retain it. He seeks out every feature which is likely to add to the value of his books, and is quite original in most of them. The volume before us is doubtless intended as a companion volume to Harrigan & Thompson's Leading Cases on the Law of Self-Defence. He has gathered every reported case, and given us all there is on the subject in them all. A large number of cases are published in full; the remainder in exhaustive notes. The book is divided into six chapters upon The Legal Test of Insanity, The Burden of Proof of Insanity, Drunkenness, Kleptomania and Somnambulism, Evidence and Practice, Insanity at trial or after conviction. The table of cases shows wherever any case has been cited. In the Contents is a logical index to the subject, while in the Index we find a full digest of all the cases. This is a valuable book; it places between two covers all the law scattered through hundreds of volumes, difficult to find. It is upon a subject of growing importance, and every lawyer who has anything to do in the criminal courts will use it. The law seems to be carefully stated, and, indeed, we should be surprised to find anything else from the author. All the cases are interesting, and were it not for want of space, we should feel like quoting from some of them. The treatment of the subject is exhaustive, and no one need go beyond this book to obtain what he desires. The book is handsomely printed and bound.

CLOUSTON ON MENTAL DISEASES. Clinical lectures on Mental Diseases by T. S. Clouston, M. D. Edin. F. R. C. P. E., Physician Superintendent of the Royal Edinburgh Asylum for the Insane; Lecture on Mental Diseases in the Edinburgh University; formerly co-editor *Journal of Mental Science*," Foreign Associate of the *Societi Medico-Psychologique*; Honorary member of the Association of Medical Superintendents of American Institutions for the Insane, and of the New England Physological Society, to which is added an abstract of the statutes of the United States and of the several States and Territories relating to the custody of the Insane, by Charles F. Folsom, M. D., Fellow of the American Academy of Arts and Sciences; Assistant Professor of Mental Diseases, Harvard Medical School; Physician to out-patients with diseases of the nervous system, Boston City Hospital, Philadelphia, Henry C. Lea's, Son & Co., 1884.

The title page fully points out the nature of the work. It of course treats of a subject more interesting to the medical than the legal profession, though the appendix of statutes will make it useful to the latter. It is a thorough review of the subject of mental diseases from a medical standpoint, and therefore proves a good companion volume to one treating the subject from a legal point of view. The mechanical execution is excellent.

NOTES.

——The Supreme Court of Louisiana lately upheld a verdict in tresspass for $700, rendered against a furniture dealer for unlawfully retaking furniture upon failure to pay for it. Say the court: "The unlawful invasion of the pauper's hovel, and abstraction of its scadty possessions is an injury identical in character and magnitude with the like entry of a palace and the despoiling it of its gorgeous apparel."—*Ohio Law Journal.*

——The late Judge Black was a Shakesperean critic, and nothing grated on his ear more harshly than a misquotation. During the last constitutional convention of Pennsylvania, of which he was a member, the country delegates could scarcely make a speech without dragging in some poetical excerpt, which they usually "butchered", and the Judge, who never knew whether he was out of order, would interrupt them with corrections, or go to the clerk's desk to see that the lines were printed right. One day there had been an unusual number of mishaps of this kind, and the Judge had secured leave of absence to go home. Just before leaving he walked over to George W. Riddle's seat and said: Riddle, I am going away, and if in my absence you allow any injustice to be done to the memory of William Shakespeare I will hold you personally responsible."

——Some time ago Judge Q. of Tennessee, was pressing a suit before a Stewart county jury against the railroad in an action for damages for killing his client's cow. "What is that thing, gentlemen of the jury, what is the name of that instrument of death fastened on in front of the engine!" asked the Judge, with well-feigned ignorance. "It's the cow-catcher." replied one of the jurors. "Ah; I though so," continued Judge Q.; "I thought so. And yet Judge Lurton, with more cheek than any young man I ever knew, tells you that the railroads do not intend to destroy your stock, even while they carry a cow-catcher, put there to run your cows down and catch 'em and kill 'em, as the name of the fearful engine of destruction implies—even while the roads fasten this cow-catcher on in front of the train—yes, gentlemen, it is fastened on to chase your cows around and catch the poor things and crush the very life out of them." The Judge got his $75 verdict for a $15 cow; and what's more, he got his free pass "tuck up" on the way home, and has been paying the usual *per mile-em* ever since.